Topic 2: Dichotomies of the Australian Criminal Justice System

Criminal wrongs v Civil wrongs – PT5-6 & TXT8-10 & Activity 2.1 & SG17

- A person who is harmed by a tort or by a breach of contract may sue for damages or obtain some other remedy in a civil court
    - They have been 'wronged' but the harmful conduct may not be regarded as sufficiently serious to constitute a crime
- There are some mischiefs that harm the public rather than individual victims
    - In these cases, the CL may be justified in stepping in to ensure that such harmful activities are controlled, even though the mischief may constitute only minor incursions on basic social functionings ("victimless crimes")
        - Eg. Prostitution, drug use, etc
- Distinguishing Civil from Criminal is only a preliminary function of the CL
- It's primary task is to stipulate the degree of seriousness of criminal conduct
- We need to determine if the mischief is sufficiently serious to be made a crime and if it is a crime, how serious it is when compared to other crimes
- Knowing the degree of seriousness of criminal conduct is vital to selecting proper label of offence & appropriate penalty
- Other reasons why it is important to consider – see PT6
- Is restitution the answer? See Activity 2.2
    - Despite the problems listed in Activity 2.2(2), restitution orders in favour of victims are increasingly sought and ordered by criminal courts

THE DIFFERENT CRIMINAL JURISDICTIONS IN AUSTRALIA SG21 & PT8

Criminal law in Australia can be divided into 2 forms:

1. Statutory law (enacted by legislature)
2. Common law (formulated by Judges)

The following jurisdictions have their own 'criminal codes' (statutes that comprehensively lay down the CL):-

- The Commonwealth
- Queensland
- Western Australia
- Tasmania
- Northern Territory
- Australian Capital Territory
- Activity 2.4

The following jurisdictions have much of their CL formulated & developed by Judges (common law):-

- New South Wales
- South Australia
- Victoria

Why the variety of CLs in Australia is unsatisfactory:-

- There remain material differences in much of the substantive CLs of these jurisdictions
- Definitions of offences
- Their range of seriousness
- The definitions of defences
- Prescribed punishment
- The result is inconsistency and incoherence in outcomes when dealing with like cases in different jurisdictions
- Justice dictates that persons engaged in criminal behaviour should be treated in the same way throughout this country (M Goode CL Journal 1992) – PT8
- After nearly 2 decades there is little evidence that the S&T govts are prepared to replace their existing CLs with the one proposed by the Model Criminal Code

Shaw v DPP (1962) – Shaw created a 'ladies directory' which listed contact details of Prostitutes details, no law in place to prohibit doing so however the Courts created a precedent with him & gave him 9 mths imprisonment

- Australian courts have rejected the House of Lords doctrine, recognising the 'big brother' implications of the offence of 'conspiring to corrupt public morals'
- Courts have insisted that the absence of authority for the English development was grounds enough for never introducing it into the Australian law
- See Activity 2.5
- Tutorial 2.2

The Relationships between Australian Criminal Law & International Criminal Law – SG24

International crime = those that are considered the most serious crimes of concern to the world community as a whole and are generally viewed as threatening world order and security – eg. Genocide, crimes against humanity, war crimes, crimes against aggression (ICJ stuff)

Transnational crime = are those involving conduct that crosses national borders or affects the interests of more than one state (the concept also implies offences that have extraterritorial jurisdiction) – eg. Trafficking in drugs & persons, organised crime, cybercrime, counterfeiting, money laundering, financial crimes and wilful damage to the environment – TXT941

Activity 2.7

- International treaties and other international agreements provide the constitutional basis for much Federal govt legislation via the 'external affairs' power
    - Examples of legislation the Federal Parliament has enacted that is based upon international law are:-*Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Privacy Act 1988* – SG25
    - This is particularly important in the area of CL as there is no plenary power in the Constitution for the Federal govt to enact criminal laws
- It is well established that Australian courts can use international law principles when there is ambiguity or a gap in the common law
- There is a presumption that legislation will not violate the rules of international law

    - Therefore if there is ambiguity in the meaning of a statute, it will be presumed that the meaning that is closest to the international law rule will prevail
- International law may show that the common law is 'manifestly unjust' and therefore should change
    - Eg. Mabo – where Brennan J held that 'the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support' being based on notions of indigenous people that developed in 'an age of racial discrimination'
- The work of the Australian Human Rights Commission (HRC) is guided by those international human rights Treaties which are listed in a schedule to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*
- When the UN Security Council makes any resolutions based upon Charter VII of the UN Charter (which is not that often) these resolutions are binding upon each State Member of the UN – thus Australia must carry out the terms of the resolution, and this may include Australia being forced to enact specific legislation
- One of the most important achievements in international law was the agreement by 120 nations in Rome 1998 to create the ICC & the subsequent ratification of the ICC Statute
- This will have a very significant impact in the future on Australian CL & procedure
- Activity 2.8

Common Law Criminal Justice Systems CONTRASTED with Civil Law Criminal Justice Systems SG27

Common law systems are adversarial – Activity 2.9

- In the adversary system the parties are in charge of the action
- They initiate it, set it up, call the evidence, call witnesses and merely use the court as a forum
- In the criminal sphere, the state takes the place of the Plaintiff & the D is the accused
- Criminal cases are run by the prosecutor (police or crown prosecutor) and the D (the accused) defends the action
- The same theory applies that the parties run the action – the difference is the State has more resources than most individuals
- The Judge sits on the bench and makes rulings about what evidence is admissible (referring to the law of evidence) and what procedure should be followed, but otherwise does not interfere with the running of the case
- He does not ask questions except to clarify or ask to repeat for inaudible matters
- After the trial is over the Judge decides on the law & writes a judgment which becomes a precedent
- Where there is a jury, the Judge directs the jury on the law which they should apply to the facts
- The court is bound by the jury's determination
- Appeals to higher courts are allowed but only on matters of law – eg. Whether evidence was wrongly admitted/excluded or the Judge directed the jury wrongly

Civil law systems are inquisitorial

- Evidence in civil proceedings is collected by the parties by the process of discovery & interrogatories
- There is a complex set of rules about what can be discovered (eg. One is not to go on 'fishing expeditions')
- Evidence for criminal matters is collected by the police
- They then have to present it at a hearing before the court
- The Judge takes an active role & may direct parties to present witnesses or collect evidence
- The Judge also questions the witnesses
- Juries are rare or do not exist & the law of evidence is minimal

Adversarial	*Inquisitorial*
Judge unfamiliar with matter pre-trial	Judge directs pre-trial inquiry
Judge passive in development of evidence	Judge actively directs evidence
Advocates call and question witness	Judge calls and questions witness
Complex rules of evidence	Few rules of evidence
Defendant has right to silence	Defendant thoroughly questioned throughout trial
Guilt determined, then sentence	Guilt and sentence determined together
Proof—Balance of probability or Beyond Reasonable Doubt	'Full proof' mathematical proof
Limited rights of appeal (law only)	Broad rights of appeal on law and fact
No new evidence admitted on appeal	New evidence may be admitted on appeal
Acquittal is final	Acquittal may be appealed
Lay juries	No lay juries
Prosecutor has discretion re charges (may plea bargain)	No prosecutorial discretion (no plea bargaining)

The ICC is an excellent example of a criminal court that attempts to combine the features of common law and civil law systems

While proceedings are basically adversarial, a number of 'civil law' features include:-

- No juries
- Judges have much influence in pre-trial matters (extensive use of Chambers to resolve pre-trial issues)
- Justice active during trials
- Broad rights of appeal on both facts and law
- A potential role for the victim beyond the passive role set under the common law

The Disparity between Serious Offences & Minor Offences in Australian Criminal Justice – SG28

The classification of offences is most significant for determining the mode of trial used to adjudicate guilt – crimes are conveniently divided into the following classes

- **Indictable offences**: offences triable on indictment before a Judge & jury
    - usually reserved for more serious offences
- **Summary offences**: offences triable summarily before a magistrate
    - Magistrate sits as both the tribunal of law and fact
- **Hybrid offences**: offences triable either way
    - A hybrid offence is one where with the consent of either or both parties (the D & the Prosecutor), the matter can be heard in either type of court
    - Where the accused in an indictable matter may elect to be tried before a single judge sitting without a jury
        - Eg. In NSW a person prosecuted on indictment has a general right to elect for trial by judge alone (s132 *Criminal Procedure Act 1986 (NSW)*) with consent from DPP (s132(3))
    - The summary offence that may be heard by the SC judge sitting without a jury
        - s475B *Crimes Act 1900 (NSW)* was introduced to deal with complex 'white collar' crimes which can take months & this section provides a quicker procedure for dealing with such cases – only the accused can elect this
    - there are also indictable offences that must be dealt with summarily unless the prosecution elects to proceed by way of an indictment (Sch 1, ss258-273 *Criminal Procedure Act 1986 (NSW)*)

Reading 2.9 – McBarnett critique

- "due process" is/was ruled out of the lower courts on 2 grounds:-
    - Both the offences and penalties are too trivial
    - The issues and processes are such that the niceties of law and lawyers are irrelevant
- The Magistrates courts deal with trivial matters (minor offences, everyday cases, ordinary cases) – too trivial to attract any serious attention from the press
- 'liberty' ceases to be absolute and becomes subject to a measuring rod
- The limited penalties available to Magistrates means they can interfere less with one's liberty than the higher courts, so defendants in these courts need less due process
- The less one's liberty is at risk the less one needs protection
- The offences dealt with in the lower courts do not involve much law or require much expertise or advocacy
- The lower courts are closeted from the public eye by the ideology of triviality, so the higher courts alone feed into the public image of what the law does & how it operates
- But higher courts only deal with 2% of all criminal cases
- Almost all criminal cases go through the lower courts without traditional 'due process'
- Activity 2.11

Theories of Criminal Justice:- Crime Control & Due Process – SG30 & TXT40 & Activity 2.12

Herbert Packer's models

Crime control method is concerned with the repression of criminal conduct, its emphasis is on social control and maintaining public order

- Considerable attention is paid to promoting efficiency, with a stress on effectiveness & the avoidance of legal rules that are obstacles to this objective
- This consideration favours reliance on administrative rather than judicial procedure
- Informal but efficient procedures are given priority, leading to widespread reliance on confessions as a means of inducing guilty pleas and the efficient disposal of cases
- The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the crime control model demands
- The presumption of guilt is descriptive and factual; the presumption of innocence is normative and legal
- The presumption of guilt is central to the crime control model: the dominant goal of repressing crime can be achieved through summary processes, without loss of efficiency because of the probability that the preliminary screening process used by the police & prosecution contain adequate guarantees of reliable fact-finding
- Minimal control over the police is a central feature to this model (criminal process must place few restrictions as possible on administrative fact-finding & police powers)
- Crime control will tolerate some degree of error

(Crime control is counter-balanced by the Due Process Model)

Due Process is a series of procedures designed to impede the suspect's further progress through the system

- The focus on this model is not about the prevention of crime, but on the control of State power in a liberal democracy
- The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty
- This model stresses the possibility of error in fact-finding (eg. Witnesses may be mistaken or confessions may be unreliable)
- There is a suspicion in normal fact-finding & a premium placed on the use of legal procedures of formal, adjudicative, and adversarial processes for discovering and evaluating evidence
- Due Process insists upon the prevention and elimination of such mistakes
- Rules are developed – such as the presumption of innocence and the burden of proof – that are designed to ensure the observance of standards that limit the exercise of official power
- What due process requires is that the State must be forced to prove its case which brings into operation a whole series of rules designed to limit the use of criminal sanction against the individual & increase the accused's opportunity of securing a favourable outcome
- Even when a person's guilt is clear, the legitimacy of the process is what matters: it is more important to constrain errant police and prosecution than to secure a conviction

Criticisms:

- crime control is what happens, due process is what should happen – TXT42
- if we bring due process down from the dizzy heights of abstraction and subject it to empirical scrutiny, the conclusion must be that due process IS for crime control (McBarnet)

- the crime control theory fails to recognise that guilt is not simply the product of legal rules applied at trial, but is 'construed' at an earlier stage by the key players within the system, such as police, prosecutors and informers
- the crime control method does not conceive repression of police illegality as part of its mission – TXT45

Distinguishing between the TRADITIONAL RETRIBUTIVE based Criminal Justice Model and OTHER models of Criminal Justice – SG31

'Retributive' or 'punitive' system = traditional criminal justice system (geared towards the punishment of offenders)

Restorative Justice System - Reading 2.10 – P441-446 & Activity 2.13 & 2.14

'A process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future' (Marshall 1996)

- some say this definition is too narrow b/c it includes only face to face meetings
- it emphasises process over a desired outcome of 'repairing the harm'
- it ignores the fact that actions to repair the harm may need to include coercive responses (Walgrave 2000)

'Every action that is primarily oriented towards doing justice by repairing the harm that has been caused by crime' (Bazemore & Walgrave 1999)

- promises to hold offenders accountable for crime in ways that are constructive, but not punitive or harsh
- this system aims to address the needs of both offenders & victims
- levers of change: the relationship of victims, offenders & communities
- it endeavours to include the voice & experience of crime victims
- emphasises face to face interaction & communication between offenders, victims & their supporters

Elements of Restorative Justice

For criminal matters, restorative justice typically contains these elements & set of activities:-

1) offenders have admitted to the offence (or have chosen not to deny)

2) offenders & their supporters have a face-to-face meeting with a victim (or their rep) and a victim's supporters, although the face-to-face meeting is not essential (other ppl may be present ie police)

3) the process is informal & the organiser establishes the ground rules for participants

4) discussions & decisions taken rely on the knowledge & decision making capacities of lay actors rather than legal actors (although legal actors may be present)

5) the aims are to reduce victim fear & anger toward the offender, for the victim to 'tell the story' of how the crime affected them, for the offender to acknowledge the harm & negative consequences

the crime caused the victim, to apologise sincerely & to make up for what they did (repair the harm) by penalties (or outcomes) agreed to

6) common outcomes include verbal or written apologies, monetary restitution, performing work for the victim or community or attending counselling sessions

7) the major kinds of restorative justice practices include conferences circles & sentencing circles & a variety of enhanced forms of victim-offender mediation

Integration

- The history of restorative justice practices begins in NZ with the passage of the *Children, Young Persons & Their Families Act 1989* (which introduced the term 'family group conferencing'
- NZ was the first world jurisdiction to provide a statutory basis for conferencing & continues to have the most systematic model
- Legislated 'NZ style' conferencing was introduced in SA (1994), WA (1995), QLD (1997), NSW (1998), NT (1999), TAS (2000) & ACT (2005) – drat leg is currently under review in VIC
- 3 kinds of variations are evident in the operation of conferences
    - Jurisdictions vary in length of time to complete an outcome (ranges from 6 wks (WA) to 6 mths (NSW) & 12 mths (SA)
    - While all jurisdictions prefer that the outcome be reached by consensus, they differ on which people, at a minimum, must agree to it
        - NSW (where police do not need to be present) - the young person & victim (if present) must agree to the outcome plan
        - QLD – the young person, victim & police officer must approve the outcome
        - In all jurisdictions the outcome is a legally binding document
    - Jurisdictions vary in the kinds of offences that can be conference, in the upper limits of outcomes, and in the volume of cases handled
        - WA – many offences may not be conference (termed 'scheduled' offences); the state tends to conference a high volume of less serious cases (3084 cases on average p/yr)
        - SA – there are no scheduled offences; the State conferences a high volume of cases (1500-1700 a year) & has the highest maximum of community service hours (300 hours)

Strengths & Limits

- ✓ A consistent finding with research in the region is that conferences are perceived as fair & that participants are satisfied with the process and outcome
- ✓ Conferences can also play a role in reducing victim's anger & fear toward offenders
- ✓ The strength of the conference process is the potential to communicate the impact of the offence and the potential for offenders to make a sincere apology, take responsibility for the offence & attempt to make up for the wrong
- ✓ When offenders are observed to be remorseful & when conferences outcomes are achieved by a genuine consensus, the prevalence of reoffending is reduced
- ✓ The conference process can help some victims recover from crime, but this depends on the degree to whch the crime distressed them in the first place

- × Compared to the very high levels of procedural justice, there is relatively less evidence of 'restorativeness' (positive movement between the offender & victim & their supporters during the conference itself)
- × This suggests that although the process is perceived as fair, there are limits on the offender's interests to repair the harm & on victim's capacities to see offenders in a positive ligh
- × Victims, offenders and their supporters may not be prepared for restorative ways of thinking & acting
- × There are legal constraints on the process
    - b/c restorative justice does not have a fact-finding or investigating mechanism, it cannot replace established criminal justice
    - it can be used in some jurisdictions for youth cases but not in others

Indigenous Justice – Reading 2.10 - PP446-453

Indigenous justice refers to a variety of contemporary justice practices in which indigenous ppl have a central role in responding to crime

The practices include urban sentencing courts, community justice groups participation in sentencing, community and Elder panels participation and a variety of forms and contexts of sentencing circles

It is seen as a way to rebuild indigenous communities and to redress the destruction of indigenous ppl's culture and social organisation brought about by colonialism & state violence

- ➢ Focuses largely (not exclusively) on the offender's needs
- ➢ Levers of change: the relations between indigenous people & 'white justice'
- ➢ It is important for the indigenous ppl to be given options and opportunities to develop processes that respond to the needs of that community (otherwise such practices should not be termed indigenous justice)
- ➢ The typical indigenous justice practices in Australia are those in which indigenous groups or communities have 'input' into sentencing decisions – such 'input' or 'advice' may have developed from consultations with indig groups who have a degree of control over the process & the outcome, or they may have been completely imposed by 'white justice'
- ➢ Why indigenous urban courts & other practices have emerged in Australia – PG447

Practices

There are now 2 kinds of indigenous justice practices in Australia:-

1) Courts in urban centres – which set aside 1-3 days a month to sentence indigenous offenders

2) Practices in remote indigenous communities when judicial officers travel on circuit

3) Increasingly, there is a blurring of these 2 types with hybrid forms such as the introduction of Circle Courts to more remote areas of NSW

Urban Courts

History & development – P448
By the end of 2005, there will be nearly 20 urban courts operating in Australian urban areas or regional centres, including several for youth offenders and those that are part of circuits to more remote areas

They have these elements in common:-

- An offender must be indigenous (or in some courts South Sea Islander) & have entered a guilty plea
- The charge is normally one heard in a Magistrates' Court
- The offence must have occurred in the geographical area covered by the Court
- A Magistrate retains the ultimate power in sentencing the offender, whist seeking advice of Indigenous Elders
- During the sentencing process, the Magistrate sits at eye level with the offender at a bar table (rather than elevated bench) with an Elder (the Elder's role varies)
- The # of Elders varies over time & place
- An important development is the presence of Indigenous court workers (called Aboriginal justice workers, Aboriginal project workers or Indigenous court liaison officer) whose role varies by jurisdiction (some have an active role in assisting the prosecutor, offender & defence lawyer to devise a sentence plan that is presented to the Magistrate, some coordinate post-sentence follow-ups, some do not speak during hearing but key role behind the scenes)

Strengths & Limits

- ✓ Indigenous groups say they have more trust in & better understand the court's decisions because they are involved & have a say
- ✓ The research finds that the strengths of the courts lie in improved communication, reliance upon Indigenous knowledge & mechanisms of social control, and fashioning more appropriate penalties
- ✓ there is greater attention paid to the reasons for and contexts of offending behaviour, coupled with 'indigenous friendly' procedures and Aboriginal justice workers
- ✓ Magistrates who sit in those courts say there are significant increases in D's court attendance rates & reductions in re-offending
- × Some are concerned the courts are tokenistic & paternalistic or that they are a form of 'bureaucratic colonialism'
- × The urban courts may appear to deliver a separate 'apartheid justice'- one for indigenous, and another for non-indigenous people
- × Indigenous D's "access to justice" is even more complicated; courts are avail in some cities and regional areas, but not others & some indigenous offenders may be deemed more suitable than others
- × 1 of the most significant challenges is for judicial officers, prosecutors and defence attorneys to 'let go' of western legal power & for the ability of judicial officers to manage a process requiring empathy, stamina & a feel for the subtleties of these cases

Therapeutic Jurisprudence – Reading 2.10 - PP453-TXT27-30

'it focuses attention on the law's impact on emotional life and psychological well-being and proposes to use the tools of the behavioural sciences to study the therapeutic and anti-therapeutic impact of the law' (Winick & Wexler, 2003)

- The term was first introduced in the US in the late 80s for mental health cases & has since expanded to include family, criminal and civil cases
- Problem-solving courts (AKA problem-oriented courts) were established in 1989 in the US, with the founding of the first drug court
    - Drug courts (& other specialised courts) were then linked to therapeutic justice
    - In 2000, a US Conference of Chief Justices & Administrators endorsed the idea of problem-solving courts, using the principles of therapeutic justice
- Winick & Wexler propose that therapeutic justice principles could be brought into ALL judicial contexts to help ppl solve crucial life problems
- They suggest that with a broader application of this principle, judicial officers:-
    - ✓ Can interact with individuals in ways that induce hope & that will motivate them to using avail treatment programs
    - ✓ Can use techniques to encourage offenders to confront and solve their problems, to comply with rehab programs & develop law-abiding coping skills
    - ✓ Will need to develop enhanced interpersonal skills, u/s the psychology of procedural justice & learn to be effective risk managers
- This approach is evolving – it continues to be associated with a set of principles normally featured in problem-solving courts which include
    - Integration of treatment services with judicial case processing
    - Ongoing judicial intervention and close monitoring
    - Multi-disciplinary involvement and collaboration with community-based and govt organisations
- In the US, therapeutic justice is being used in a range of problem-oriented courts, including drug treatment, DV, mental health & teen courts (also being applied when taking guilty pleas and in appellate procedures)
- In Oz, therapeutic justice is discussed, not only in the context of problem-solving courts, but also in corrections, administrative tribunals & appellate procedure
- It came into common use in Oz in the late 90s
- Emphasis is given to adopting a more respectful approach to clients & the need for a different style of judging that may encourage greater insight and behavioural change in offenders
- It is seen as promoting an 'ethic of care' in professional activities and as 'resonating with the alternative dispute resolution/restorative justice movement'
- In Nov 2004, WA country magistrates passed a resolution unanimously to 'endorse and adopt the principles of therapeutic jurisprudence'
- It uses processes to promote the positive involvement of participants in the court process & thereby promote respect between the judicial officer & participants, including actively

listening to participants, courteously allowing them to fully present their case & acknowledge their position

- It is used today in 2 ways:
    - To describe a new approach to the judicial officer's role that could be used in any court (incl it seems in restorative justice meetings & in forms of indigenous justice)
    - As an approach that is applicable to problem-solving courts, although it may not necessarily be the approach taken in all such courts

Strengths & Limits – P455 & TXT30

- ✓ TXT30 for table 'for & against'
- ✓ The principles of therapeutic justice invite judicial officers to take a hands-on approach to their cases, to know more about offenders and the contexts of their offending and to be attentive and sympathetic listeners
- ✓ Like research on restorative justice, a recurring finding is that participants say they are listened to and they perceive the process as being fair
- ✓ Another common finding is that graduates of drug programs fare better than others in reduced re-offending (however there is great deal of attrition from entry to the program to graduation)
- × The literature largely centres on judicial officer's & other accounts of using the principles in diverse settings but there is scant research on whether the desired positive effects of therapeutic justice, as a way of judging, do in fact occur
- × Among the criticisms as a way of judging & as a problem-solving orientation are:-
- × That it undermines the role of judicial officers as neutral arbiters, applying law to cases
- × The therapeutic justice judge is more like a coach, helping an admitted offender to become more law-abiding, taking a team approach & working with others, & relying on social science knowledge
- × With an emphasis on negotiation, mediation, and teamwork, not adversarial lawyering, therapeutic justice poses challenges to the typical roles of prosecutors and defence attorneys in the court process
- × Problem-solving courts are labour intensive time consuming, and require resources; it's not possible to have them in all jurisdictions
- × For this reason, some are advocating for a problem-solving approach to cases, which is not necessarily tied to specialised courts

Similarities, Differences & Relevance – P456

Similarities

- Not only is therapeutic justice now linked with restorative justice, it is also linked with indigenous justice – see P454
- The 3 approaches share similarities in that they emphasise the need for more effective forms of communicating in relating to and helping offenders desist from crime and reintegrate into a community

- They all identified failures with mainstream criminal justice & all sought methods of "doing justice" in different ways
- Restorative justice desired to bring the voice & experiences of victims more centrally into the criminal process; indigenous the voice & experiences of indigenous communities & therapeutic justice a more responsive & social science informed judiciary & magistracy
- they are set in motion only after a person has admitted responsibility for offending (although there are some exceptions with drug courts)
- in general, the 3 approaches are used in the penalty phase of the criminal process
    - However if a person has been wrongly accused, there must be procedures to test the veracity of the State's claims of criminal offending
    - For that reason, none of these 3 approaches to justice, as currently practiced, can replace mainstream criminal justice
    - None has yet introduced a new way to adjudicate 'facts' or a new vision of the trial
- These practices are however relevant in most cases in Magistrates courts b/c most Ds eventually plead guilty to offences
- they all seek ways to fashion more meaningful & effective responses to admitted offending
- all emphasise 'improved communication' btw legal authorities, offenders, victims & community members
- for restorative & indigenous justice, emphasis is placed on negotiating a variety of views in fashioning outcomes, incl those of offenders, victims, & community people or organisations
    - to secure trust in the authority of legal actors, emphasis is placed on procedural justice: treating people with respect, listening to what they have to say, being fair to everyone
    - emphasis is also placed on using persuasion & support to encourage offenders to be law-abiding
- they all view incarceration as a penalty of 'last resort' (except in some drug courts)
- all assume that more time is required in each case & some may require new staff & programs
- they all believe their justice practices reflect the way mainstream justice should done

Differences

- in the way they emerged:-
    - Restorative justice's history is the most complex, having different contexts and antecedents in N.America, NZ, Oz, among others
    - Indigenous justice in Oz emerged from a coalition of indigenous groups, judicial officers & in some cases policy makers
    - Therapeutic justice was spawned in the US & emerged largely from the activism of judicial officers
- for the sight of legal activity:-
    - Restorative justice is the least court- centred
    - Therapeutic justice is the most court-centred
    - Indigenous justice falls midway
- for the role & participation of crime victims:-
    - This is central to restorative justice
    - Is somewhat less evident in indigenous justice

    - Least evident in therapeutic justice (with the exception of family violence court)
- for whether the practices operate within a legislative framework:-
    - This is most frequent in restorative justice
    - Less so for the other 2